Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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This issue contains

DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 78–137)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS
Washington, D.C., May 11, 1978

Notice is hereby given that pursuant to section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning June 4, 1978.

Installation	*Biweekly excess cost*
Montreal, Canada	$13,860.00
Toronto, Canada	27,694.00
Kindley Field, Bermuda	4,870.00
Freeport, Bahama Islands	10,033.00
Nassau, Bahama Islands	20,067.00
Vancouver, Canada	10,198.00
Calgary, Canada	7,712.00
Winnipeg, Canada	1,840.00

JOHN A. HURLEY
Assistant Commissioner
(Administration)

(T.D. 78-138)

Customhouse Brokers—Customs Regulations amended

Part 111 of the Customs Regulations, pertaining to Customhouse brokers, amended

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 111—CUSTOMHOUSE BROKERS

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final Rule

SUMMARY: This document amends the Customs Regulations relating to customhouse brokers to (1) reflect a change in the title of the Customs Service office responsible for the inspection and audit of customhouse broker's books and records, (2) permit the use of microfiche for the reproduction of books and papers required to be kept by customhouse brokers, and (3) eliminate the use of Customs Form 3079, Record of Transactions of Licensed Customhouse Brokers. These changes are required in order to reflect (1) a reorganization within the Customs Service, (2) the decision by the Customs Service to permit the use of microfiche record retention systems by customhouse brokers, and (3) a commitment by the Customs Service to reduce the number of Customs public use forms.

EFFECTIVE DATE: June 21, 1978.

FOR FURTHER INFORMATION CONTACT:

Marcus Sircus, Regulatory Audit Division, United States Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-2812).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As a result of a reorganization within the Customs Service, the Regulatory Audit Division of the Office of Operations has assumed overall responsibility relating to the inspection or audit of the books and records of customhouse brokers. Formerly, this responsibility was

carried out by the Office of Security and Audit. The functions previously exercised by the regional director, security and audit, in connection with the inspection or audit of the books or records of customhouse brokers are now exercised by the Regional Director, Regulatory Audit. Similarly, the activities of Customs field auditors in this area are now performed by Customs regulatory auditors. These changes affect various provisions of Part 111 of the Customs Regulations, the part of the regulations which concerns customhouse brokers.

To reflect the changes in titles necessitated by this reorganization, sections 111.22(b), 111.22(c), 111.23(b)(5), 111.24, 111.25, and 111.27 of the Customs Regulations (19 CFR 111.22 (b) and (c), 111.23(b)(5), 111.24, 111.25, 111.27) are amended by substituting "Regional Director, Regulatory Audit" for "regional director, security and audit" and "regulatory auditors" for "field auditors", wherever those terms appear.

In addition, the Commissioner of Customs has received numerous requests from customhouse brokers for permission to adopt microfiche record retention systems. Under the current provisions of section 111.23(b) of the Customs Regulations, customhouse brokers are permitted, upon approval of the district director, to record on microfilm any of the books and papers required to be kept by them (except books of accounts and powers of attorney).

After a review of the law and regulations and other relevant considerations, the Commissioner has determined that the microfiche reproduction of these books and records can and should also be permitted. Accordingly, section 111.23 is further amended by adding a new paragraph (d) to provide that under certain circumstances a broker, with the approval of the district director for the district in which he is licensed, may utilize other methods of reproduction, including microfiche, for the reproduction of books and papers, other than books of accounts or powers of attorney, permitted to be microfilmed under paragraph (b).

In response to Presidential and Treasury directives, the Customs Service made a commitment to reduce the number of Customs public use forms, one of which is Customs Form 3079, Record of Transactions of Licensed Customhouse Broker. The Customs Service has determined that Customs Form 3079 may be abolished. However, it is necessary to continue to require that customhouse brokers record their transactions in a manner and format that is acceptable to Customs.

Consequently, section 111.22 of the Customs Regulations (19 CFR 111.22), which provides for the use of Customs Form 3079 by the

customhouse broker in recording all of his Customs transactions in an acceptable manner, is being further amended by elimination of references to Customs Form 3079 and by the addition of a new paragraph (d) to require a customhouse broker to keep a record of all his Customs transactions in a prescribed format.

DRAFTING INFORMATION

The principal author of this document was Suellen Ferguson, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in its development.

INAPPLICABILITY OF PUBLIC NOTICE REQUIREMENT

These amendments clarify or liberalize the Customs Regulations, or conform them with existing practice, and impose no additional duty or burden on the public. Accordingly, the Commissioner determined that no advance notice of the amendments or solicitation of public comments prior to their adoption was necessary under 5 U.S.C. 553.

AMENDMENTS TO THE REGULATIONS

Under the authority of R.S. 251, as amended (19 U.S.C. 66), and sections 624 and 641, as amended, 46 Stat. 759 (19 U.S.C. 1624, 1641), sections 111.22, 111.23, 111.24, 111.25, and 111.27 of the Customs Regulations (19 CFR 111.22, 111.23, 111.24, 111.25, 111.27) are amended as set forth below:

Section 111.22 is amended by changes in paragraphs (a), (b), and (c) and the addition of a new paragraph (d) to read as follows:

§ 111.22 Additional record of transactions.

(a) *Additional requirement.* In addition to the regular records of account required by section 111.21, each broker shall keep current a record of all his Customs transactions in the format set forth in paragraph (d) of this section, unless an exemption has been granted under the authority of paragraph (b) of this section. If a transaction has been handled only in part by the borker, he shall supply only the information required by this section which relates to his transaction.

(b) *Exemption.* If the information required in paragraph (a) is disclosed in other books and records regularly kept and maintained by a broker and if such information is in a systematic, convenient, and readily available form so that Customs regulatory auditors can make an effective and complete inspection thereof, the district director, with the concurrence of the Regional Director, Regulatory Audit, may in writing exempt the broker from the requirements of

262-705—78— —2

paragraph (a) of this section. A written request for exemption shall be addressed to the district director and shall include:

(1) A statement of facts as to the records kept; and

(2) An agreement that, if the exemption is granted, no change in the system of books and records or the manner of keeping and maintaining them will be made without prior written approval of the district director and concurrence in the change by the Regional Director, Regulatory Audit.

(c) *Withdrawal of exemption.* Whenever an audit by a Customs regulatory auditor indicates that a broker to whom an exemption has been granted as provided for in paragraph (b) of this section is not keeping and maintaining records in conformity with the requirements of that paragraph, the exemption of such broker shall be withdrawn by notice in writing from the district director, and such broker shall thereafter keep and maintain records as required by paragraph (a) of this section.

(d) *Prescribed format.* Each licensed customhouse broker shall keep in the format set forth below and in the detailed manner indicated therein, a complete, correct, itemized record revealing all of his financial transactions as a broker. A separate sheet shall be used for the transactions with each of the broker's clients and all entries shall be made immediately after the transactions are accomplished.

Name of Broker _____ Port of _____

Address _____ Name of importer or exporter (client) _____

Entry Number	Symbol (Footnote	Date Of Entry 19__	Amounts Deposited with U.S.	Amounts Refunded Payee by U.S.	Amounts Disbursed To Client On Account of Refunds Made By U.S. Government	Broker's Fee	Bond Premium	Foreign Forwarding Charge	Inland Freight Or Express	Storage or Cartage	Dock And Messenger Service	Public Stores	Warehouse Withdrawal	Miscellaneous	Cash Received From Clients		Remarks Disposition Of Merchandise If Entry Not Completed
															Amount	Date 19__	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)

(Note.--The following symbols shall be used to show the class of entry: "C", consumption; "W", warehouse; "WWC", warehouse withdrawal for consumption; "WWT", warehouse withdrawal for transportation; "R", re-warehouse; "R & W", re-warehouse and withdrawal for consumption; "IT", immediate transportation; "T & E", transportation and exportation; "D", exportation with benefit of drawback; "EWW", exportation under warehouse withdrawal; "E", exportation; "A", appraisement; "I", informal; "PP", packed packages.)

Section 111.23 is amended by a change in paragraph (b)(5) and the addition of a new paragraph (d) to read as follows:

§ 111.23 Retention of books and papers.

* * * * * * *

(b) *Microfilming of books and papers.*

* * * * * * *

(5) *Expense of reproductions.* Brokers shall bear the expense of making hardcopy reproductions of any or all microfilmed records required by the Regional Director, Regulatory Audit, the special agent in charge, or other proper official of the United States Customs Service for the audit or inspection of books and records.

* * * * * * *

(d) *Other methods of reproduction for record retention.* A broker may, with the approval of the district director for the district in which he is licensed, utilize other methods of reproduction, including microfiche, for the reproduction of books and papers, other than books of account or powers of attorney, permitted to be microfilmed under paragraph (b), provided the requirements of paragraphs (b) and (c) of this section are met.

Section 111.24 is amended to read as follows:

§ 111.24 Books and papers confidential.

The books and papers referred to in this part and pertaining to the business of the clients serviced by the broker shall be considered confidential, and the broker shall not disclose their contents or any information connected therewith to any persons other than such clients and the Regional Director, Regulatory Audit, the special agent in charge, or other duly accredited agents of the United States except on subpoena by a court of competent jurisdiction.

Section 111.25 is amended to read as follows:

§ 111.25 Books and papers shall be available.

During the period of retention, the broker shall maintain his books and papers in such manner that they may readily be examined, and they shall be made available for inspection, copying, reproduction or other official use by Customs regulatory auditors or special agents on demand within the period of retention or within any longer period of time during which they remain in the possession of the broker.

Section 111.27 is amended to read as follows:

§ 111.27 Audit or inspection of books and papers.

The Regional Director, Regulatory Audit, shall make such audit or inspection of the books and papers required by this subpart to be kept and maintained by a broker as may be necessary to enable the district director and other proper officials of the Treasury Department to determine whether or not the broker is complying with the requirements of this part. Furthermore, the Regional Director, Regulatory Audit, and/or the special agent in charge, may inspect such books and papers to obtain information regarding specific Customs transactions for the purpose of protecting importers or the revenue of the United States. The Regional Director, Regulatory Audit, and the special agent in charge conducting an audit or inspection under this section shall submit a report of the findings to the Commissioner and the district director.

(R.S. 251, as amended, secs. 624, 641, as amended, 46 Stat. 759 (19 U.S.C. 66, 1624, 1641))

G. R. DICKERSON,
Acting Commissioner of Customs.

Approved May 5, 1978
RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the FEDERAL REGISTER May 22, 1978 (43 FR 21778)]

262-705—78——3

U.S. Customs Service

Proposed Rulemaking

The following notice of proposed rulemaking was recently published in the FEDERAL REGISTER. The Customs Service welcomes comments from the public in regard to the proposal. The comments must be in writing, addressed to the Commissioner of Customs, Attention: Regulations and Legal Publications Division, 1301 Constitution Ave., N.W., Washington, D.C. 20229, and must be received on or before the date specified in the notice.

ROBERT E. CHASEN,
Commissioner of Customs.

(19 CFR Part 4)

VESSELS IN FOREIGN AND DOMESTIC TRADES

Extension of Time for Comments Concerning Proposed Amendments to the Customs Regulations Relating to Foreign Repairs to, and Equipment Purchased for, American Vessels

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Notice of extension of time for comments.

SUMMARY: This notice further extends the period of time permitted for the submission of comments in response to the recent proposal by the Customs Service to modify its substantive and procedural requirements relating to entries for foreign repairs and equipment purchases by American vessels. This extension will permit the preparation and submission of more detailed comments by interested members of the public.

DATES: Comments must be received on or before June 30, 1978.

ADDRESS: Comments should be addressed to the Commissioner of Customs, Attention: Regulations and Legal Publications Division, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Jerry C. Laderberg, Carriers Rulings Branch, Carriers, Drawback and Bonds Division, U.S. Customs Service, Washington, D.C. 20229 (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 4, 1978, the Customs Service published in the FEDERAL REGISTER (43 FR 14060) notice of proposed amendments to sections 4.7(d)(1) and 4.14 of the Customs Regulations (19 CFR 4.7(d)(1) and 4.14) to modify its substantive and procedural requirements relating to entries for foreign repairs and equipment purchases by American vessels. The proposed amendments would establish procedures for handling each aspect of a vessel repair entry and are intended to reduce the amount of time needed to process the entry.

COMMENTS

Comments on the proposed amendments were to have been received on or before May 4, 1978. At the request of American-flag vessel operators, a notice extending the period of time to comment until June 2, 1978, was published in the FEDERAL REGISTER on May 5, 1978 (43 FR 19417). Customs has now received a request for a further extension of time. Therefore, the period of time for comment on the proposed amendments is extended until June 30, 1978.

LEONARD LEHMAN
Assistant Commissioner
Regulations and Rulings

[Published in the FEDERAL REGISTER May 19, 1978 (43 FR 21693)]

U.S. Customs Service

Protest Review Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 15, 1978

The following are decisions made by the United States Customs Service on protests filed under section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514), and with respect to which further review was requested and granted under sections 174.23 and 174.24 of the Customs Regulations.

LEONARD LEHMAN
Assistant Commissioner
Regulations and Rulings

(P.R.D. 78–1)

Errors Claimed as Basis for Reliquidation Under 19 U.S.C. 1520(c)(1)

JUN 30 1977
REFER TO
PRO–2;R:E:E
304437 K

District Director of Customs
Portland, Oregon 97209

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 2904–6–000104.

This decision concerns a protest against your refusal to reliquidate 26 consumption entries pursuant to section 520(c)(1), Tariff Act of 1930, as amended.

The entries cover merchandise imported from Hong Kong. The importer employed an agent in the transactions in question. At the

time of entry, the importer was required to post estimated duties predicated upon the invoiced unit f.o.b. prices plus an additional 30 percent.

The importer's attorneys contend that the agent was not related to the importer. In support of that contention they submitted to you a letter of May 3, 1976, from the importer's president, in which he stated that none of the provisions of section 402(g)(2) of the tariff act (which states some of the legal criteria for determining whether parties are "related," for Customs appraisement purposes), existed with respect to his company and its agent.

The importer's attorneys also contend that the appraisements were based upon the erroneous assumption that (1) either the agent and the importer were related and therefore the invoice values did not represent export value or (2) that all of the importer's entries should be appraised following an earlier determination which covered entries made by the importer at a time when it employed a related buying agent.

Section 520(c)(1) specifically excludes from relief errors in the construction of a law. A determination as to whether or not parties are related within the meaning of section 402(g)(2) of the tariff act is, in our opinion, clearly a legal determination. Likewise, the method of arriving at the dutiable value of imported merchandise generally involves a legal interpretation of applicable statutes. The importer's attorneys have not demonstrated that the addition of 30 percent to the invoiced values was due to a clerical error, inadvertence, or mistake of fact.

Under the circumstances, you are directed to deny the protest in full. Your file is returned herewith.

Sincerely yours,
(Signed) EDWARD B. GABLE, Jr.
For HARVEY B. FOX
Director, Entry Procedures
and Penalties Division

(P.R.D. 78–2)

Classification: Certain Plastic Water Globes

SEP 15 1977
REFER TO
CLA-2:R:CV:MA
051847 c

Area Director of Customs
New York Seaport
New York, New York 10048

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 1001–7–001111.

This protest was filed against your decision in the liquidation on December 3, 1976, of entry No. 56770 dated August 2, 1976, at the port of New York.

The merchandise involved manufactured in Hong Kong consists of item A 1823/4309, plastic treasure chest water globe, item 9829/4242, plastic angel fish shape water globe New York Aquarium plaque and item 8751, plastic Treasure chest water globe standard sea life design.

The merchandise was classified under the provision for other articles not specially provided for of plastics in item 774.60, Tariff Schedules of the United States (TSUS), and dutiable at the rate of 8.5 percent ad valorem. The protestant claims that the merchandise is classifiable under the provision for other household articles not specially provided for of plastics in item 772.15, TSUS, and entitled to duty free treatment under the Generalized System of Preferences.

The case of *Ace Importing Co., Inc.* v. *United States*, 50 Cust. Ct. 226, Abstract 67488, is cited as authority for holding the instant plastic water globes classifiable under item 774.60, TSUS. In this case the court found oval-shaped plastic paperweights with various scenes painted on the inside back portion and which were filled with liquid and white particles to create a snowstorm effect when moved or shaken were not chiefly used in the household. It is to be noted that the defendant in this instance did not offer any testimony to show that the paperweights in issue were chiefly used in the household.

In the case of *Koscherak Bros., Inc.* v. *United States*, 60 Cust. Ct. 45 C.D. 3253, the court ruled that certain glass "paperweights" containing "colorful artistic patterns or floral arrangements" were classifiable as blown glass household articles inasmuch as the plaintiff had failed to make a prima facie showing that the paperweights were chiefly used outside the home.

It is to be noted that in the *Koscherak* case the importer cited *Ace Importing Co., Inc.* v. *United States*, 44 Cust. Ct. 468, Abstract 64185 (1960) and *Ace Importing Co., Inc.* v. *United States*, 50 Cust. Ct. 226, Abstract 67488 (1963) as authority for their position that paperweights are classifiable as non-household items.

The court did not agree with the plaintiff's contention stating that "we agree with the Government, however, that the decisions in the Ace cases, supra, did not purport to hold that all articles known as

paperweights are dutiable as nonhousehold items." It is to be noted that in both Ace cases that there was uncontradicted testimony that paperweights were used in business offices rather than as household articles.

An examination of the representative samples submitted shows that they are souvenir articles usually purchased by tourists as novelties or reminders of places visited. They are frequently found in the household as souvenir ornaments or as paperweights.

The instant plastic water globes are too flimsy and inexpensive for office use and would detract from the dignified and businesslike atmosphere of most offices.

In view of the foregoing it is our position that the plastic water globes are of a class or kind of merchandise chiefly used in the household and consequently are classifiable under the provision for other household articles not specially provided for of plastics in item 772.15, TSUS, and dutiable at the rate of 8.5 percent ad valorem or duty free under the Generalized System of Preferences, if qualified.

You are hereby directed to allow the protest in full.

Your file is returned.

Sincerely yours,
(Signed) ARTHUR P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–3)

Classification: Slat Bed Chain

SEP 15 1977
CLA–2:R:CV:MA
046716 E

District Director of Customs
Seattle, Washington 98104

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 30044000194

This ruling concerns the protest filed against your decision in liquidating on July 12, 1974, entry No. 111757 of February 25, 1974, and entry No. 112292 of March 6, 1974, covering certain slat bed chain complete with slats imported through the port of Blaine, Washington, and classifying this merchandise under the provision for other

parts of machine tools in item 674.53, Tariff Schedules of the United States (TSUS), dutiable at the rate of 7 percent ad valorem.

The protestant claims that the merchandise is classifiable as parts of conveyors in item 664.10, TSUS, dutiable at the rate of 5 percent ad valorem, or is classifiable as other chains of iron or steel used for the transmission of power in item 652.18, TSUS, dutiable at the rate of 6 percent ad valorem.

The merchandise is invoiced as slat bed chain for a 5-foot bandmill and as slat bed chain complete with slats. For purposes of description, it is mentioned that the invoice price is per foot. One shipment covers 50 feet and the other 34.33 feet. It is used in the conveyor system of a bandmill to remove lumber from the saw as it is sawn as well as to remove knots and sawdust produced in the sawing operation.

The issues presented are whether the slat bed chain is chain, and if it is, whether it is chain used for the transmission of power in item 652.18, TSUS, or is other chain of steel in item 652.35, TSUS. These issues result from the application of General Interpretative Rule 10(ij) which provides that a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

The Encyclopaedia Britannica defines chains as a series of links, usually of metal, joined together to form a flexible connector for various purposes, such as hoisting or hauling, conveying, and transmitting power. It also notes that conveyor chains are made in a variety of constructions. This reference on conveyors states that slat conveyors consist of endless chains, driven by electric motors operating through reduction gears and sprockets, with attached spaced slats to carry objects that would damage a belt because of sharp edges or heavy weights.

In view of this data in the Encyclopaedia Britannica, the invoices describing the merchandise as chain, and trade catalogs which refer to similarly constructed articles as chain, it is our position that the merchandise is chain and is therefore not classifiable as parts under either item 664.10 or 674.53.

In *General Chain & Belt Company v. United States*, 42 Cust. Ct. 115, C.D. 2074 (1959), it was held that certain roller chain, was properly classifiable under the provision of all other chain used for the transmission of power in Paragraph 329, Tariff Act of 1930, and not as chain and chains of all kinds, of steel, also in that paragraph. This decision was followed generally with respect to what appears to have been certain H-class pintle chain in *Border Brokerage Company v.*

United States, 58 Cust. Ct. 228, C.D. 2947 (1967) and *Kelco Incorporated v. United States*, 63 Cust. Ct. 439, C.D. 3931 (1969). Since the subject merchandise is slat bed chain and not roller or H-class pintle chain, those decisions are not controlling.

In T.D. 56478(64), 100 Treas. Decs, 498 (1965), it was held that slat band conveyor chain, imported in material lengths, was classifiable under the provision for articles of iron or steel, not coated or plated with precious metal, other articles, other, in item 657.20, TSUS, and not under the provision for chains used for the transmission of power, in items 652.12 through 652.38, as it was not used for the transmission of power and was not susceptible to measurement by diameter. It was further held that such chain cut to size for fitting to a particular conveyor, was classifiable under the provision for parts of belt conveyors in item 664.10, TSUS. This decision was rendered before the enactment of the Tariff Schedules Technical Amendments Act of 1965 which added a new item, 652.35, to make a basket provision for other chain of iron or steel which was not susceptible to measurement by diameter. Senate Report No. 530, dated August 2, 1965, on the bill which became the Tariff Schedules Technical Amendments Act of 1965, contains the following comment on the then proposed item 652.35:

> Section 42. Chain and chains.—This section clarifies the treatment of chain and chains to make certain that flat chains of iron or steel are provided for (at a rate of 19 percent), and that the Customs practice of classifying certain chain on the basis of the diameter of link stock which is essentially round in cross section will be continued. No rate change is involved.

In view of this amendment which made provision for flat chains not susceptible to diameter measurement, and since the primary function of the subject chain is to transport lumber, knots, and sawdust rather than to transmit power, the subject chain is properly classifiable as other chain of steel in item 652.35, TSUS, and not as chains used for the transmission of power in item 652.18, TSUS.

Under the circumstaces, the protest should be denied in full. We have also given consideration in reaching this decision to whether the chain in question is belting and find that it is not.

Sincerely yours,
(Signed) ARTHUR P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

262-705—78——4

(P.R.D. 78-4)

Classification: Liquid Gold and Liquid Silver Jewelry

OCT 11 1977
Refer to
CLA-2:R:CV:MA
052234 LSA

District Director of Customs
Cleveland, Ohio 44199

Dear Sir:

Re: Decision on Applications for Further Reveiw of Protest Nos. 41016000065, 41016000066, 41016000067, 41016000068, 41016000070, 41016000071, 41016000072, and 41016000073

These protests were taken against your decision in the liquidation on July 9, 1976, of entry Nos. 102625, 103378, 103806, 103964, 105230, 105329, and 106343 and in the liquidation on July 23, 1976, of entry No. 106119.

The articles are necklaces of liquid gold and liquid silver with semi-precious stones and with shell, imported through the port of Cleveland, Ohio, from Hong Kong.

The articles were classified under the provision for other jewelry and other objects of personal adornment valued over 20 cents per dozen pieces or parts, in item 740.38, Tariff Schedules of the United States (TSUS), with duty at the rate of 27.5 percent ad valorem. The protestant contends that the merchandise has been uniformly classified under the provision for other jewelry and other objects of personal adornment of precious metal, in item 740.10, TSUS, with duty at the rate of 12 percent ad valorem by the New York and Hawaiian Islands ports.

An established and uniform practice as to the classification of this merchandise does not exist at any of the ports. Articles classifiable under item 740.10, TSUS, must be in chief value of precious metal. The protestant has submitted no evidence to prove that the merchandise is chiefly of gold or silver. We are of the opinion that the value of the gold and/or silver, does not exceed that value of each of the other components of jewelry of liquid gold or liquid silver. In the absence of proof to the contrary, the merchandise is classifiable under item 740.38, TSUS, with duty at the rate of 27.5 percent ad valorem.

Protest No. 41016000092 is the subject of a separate reply to the Regional Commissioner, a copy of which is enclosed.

You are directed to deny the protests in full in accordance with this determination.

Your file is returned.

Sincerely yours,
(Signed) SALVATORE E. CARAMAGNO
SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–5)

Classification: Vinyl Carrying Bag for Animals

OCT 17 1877
REFER TO
CLA-2:R:CV:MA
043737 HL

District Director of Customs
Houston, Texas 77002

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 53016000191

This ruling concerns the protest filed against your decision classifiying a vinyl animal carrying bag from England, having handles, a zipper, and small holes at both ends, under the provision for luggage of other materials in item 706.60, Tariff Schedules of the United States (TSUS), with duty at the rate of 20 percent ad valorem. The merchandise is covered by entry No. 134579 dated May 22, 1975, which was liquidated on May 21, 1976.

The protest claimed that the merchandise, designed for use as a vinyl cat carrier, is classifiable under the provision for articles not specially provided for, of rubber or plastics, other, in item 774.60, TSUS, and dutiable at the rate of 8.5 percent ad valorem, or, in the alternative, under the provision for containers, of rubber or plastics, with or without their closures, chiefly used for packing, transporting, or marketing of merchandise, in item 772.20, TSUS, and dutiable at the rate of 7.5 percent ad valorem.

Headnote 2(a)(i) to Schedule 7, Part 1, Subpart D, TSUS, describes luggage as "articles designed to contain clothing or other personal effects during travel." *Webster's New World Dictionary* (2d ed. 1972) defines "effects" as belongings or property. A pet such as

a dog or cat is the personal property of its owner and is thus a personal effect.

The instant merchandise contains handles and is designed to transport a cat during travel. It is more specifically provided for under the provision for luggage of other materials in item 706.60, TSUS, than under the provision for articles not specially provided for, of rubber or plastics, other, in item 774.60, TSUS. Furthermore, Volume 7 of the *Summaries of Trade and Tariff Information* to Schedule 7 (1968) at 74 indicates that item 772.20, TSUS, does not include plastic luggage designed for transporting personal effects during travel. Since the vinyl cat carrier is designed precisely for that purpose, classification under item 772.20, TSUS, is precluded.

The vinyl cat carrier in question is therefore classifiable under the provision for luggage of other materials in item 707.60, TSUS, and dutiable at the rate of 20 percent ad valorem. Accordingly, you should deny the protest in full.

Sincerely yours,
(Signed) A. P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–6)

Classification: Raincoat with Small Shoulder Flaps

OCT 18 1977
REFER TO
CLA–2:R:CV:MS
052730 PR

Area Director of Customs
John F. Kennedy International Airport
New York, New York 11430

Dear Sir:

Re: Decision on Application For Further Review of
Protest No. 10016010249

This protest is against your decision in the liquidation on November 19, 1976, of entry No. K326431, dated February 3, 1976. It involves the classification of certain women's raincoats.

The merchandise was classified under the provision for other women's or girls' wearing apparel, ornamented, of cotton, in item

382.00, Tariff Schedules of the United States (TSUS), with duty at the rate of 35 percent ad valorem. The sole question presented to Headquarters for determination is whether certain flaps, one on each side of the garment in the shoulder areas, constitute ornamentation for tariff purposes.

The submitted sample is a ¾ length raincoat. It has a pointed collar, long sleeves with adjustable fabric tabs near the cuff area, a full front opening with an extra row of buttons simulating a double breasted style garment, raglan sleeves, and two inserted pockets one on each side of the front opening in the hip area. It is designed to be worn with an accompanying belt. On each side of the front opening in the shoulder area there is a 6 inch by 2 inch woven fabric flap. The 6 inch side of the flap has been inserted into the raglan sleeve seam. In the approximate center of this flap is a nonfunctional button which has been stitched in place to the body of the garmet. The bottom portion of each flap hides 2 inches of a 2½ inch dart.

Textile fabric is one of the types of ornamentation specifically listed in Headnote 3, Schedule 3, Tariff Schedules of the United States (TSUS). The law is clear in this area. Where a feature listed in Headnote 3 is on a garment primarily to adorn, embellish, decorate, or enhance the appearance of that garment, that feature constitutes ornamentation even though it may perform an incidental functional purpose. *Blairmoor Knitwear Corp.* v. *United States*, 60 Cust. Ct. 338, C.D. 3396 (1968). Concerning the instant garment, we believe that the primary purpose of the flaps at their locations on the shoulders of the garment is to add to the appearance of that garment.

We are aware that the insertion of extra fabric in the seam may serve to strengthen that seam. However, in this instance, we note the size of the projecting fabric in the seam and the fact that it extends only a comparatively short distance along that seam. The fact that each flap tends to hide a portion of a dart and a pucker created by that dart goes to the appearance of the garment. Without the flaps the garment is still complete. Removal of one or both flaps does not effect the integrity of the garment.

Accordingly, the sample garment is ornamented for tariff purposes and classifiable, if in chief value of cotton, in item 382.00, TSUS.

You are hereby directed to deny the protest in full. Your file is being returned herewith.

Sincerely yours,
(Signed) JAMES W. O'NEIL
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–7)

Classification: Infants' Snowsuits Coated or Filled with Rubber or Plastics

26 OCT 1977
REFER TO
CLA–2:R:CV:MC
052989 PR

Area Director of Customs
New York Seaport
New York, New York 10048

Dear Sir:

Re: Decision on Application For Further Review of Protest No. 100171543

This protest is against your decision in the liquidation on December 17, 1976, of entry No. 437945, dated April 29, 1976. It concerns the classification of certain children's garments described as snowsuits.

The merchandise was classified under the provision for other infants' wearing apparel, ornamented, of man-made fibers, in item 382.04, Tariff Schedules of the United States (TSUS), with duty at the rate of 42.5 percent ad valorem. The importer claims that the merchandise should have been classified under the provision for garments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated with rubber or plastics, other, in item 376.56, TSUS, with duty at the rate of 16.5 percent ad valorem, or, in the alternative, under the provision for infants' wearing apparel, not ornamented, of man-made fibers, other, in item 382.81, TSUS, with duty at the rate of 25 cents per pound plus 27.5 percent ad valorem.

Four sample garments were received by this office, two of which appear to constitute a set. The garment labeled style 570 is an infant's cold weather garment. According to the label, the woven outer shell is 65 percent polyester and 35 percent cotton, the woven quilted lining is 100 percent nylon and the nonwoven batting is 100 percent polyester. It has long sleeves with pocket-like openings at their ends so that the hands of the wearer are entirely encased, legs with enclosed feet, a self hood, and a zippered opening that extends from the neckline to the knee area of the left leg. A pile fabric finishes off the edges of the hood and forms the outer portion of the pocket-like sleeve, ends. Decorative embroidery simulating ducks is located on the left front yoke panel and on the right leg area. The embroidery on the

right leg area is combined with an overlay of nonwoven fabric to simulate the duck. One row of rick-rack runs across the front of the garment approximately 1 inch below the yoke seam. Two rows of rick-rack and a pompon are located on each foot. On each side of the garment in the waist area, there is a simulated fabric adjustment tab. There is also an elasticized portion running from side seam to side seam in the back of the garment. There is no visible evidence on either side of the outer shell fabric to indicate that the fabric has been coated or filled, or laminated with rubber or plastics material.

No sample of style 502 has been received by this office. However, the importer states that the only difference between styles 570 and 502 is the type of ornamentation used.

The sample labeled style 554 is a small child's one piece snowsuit. It has long sleeves with knit cuffs, a pointed collar faced with an imitation fur pile fabric, simulated waist adjustment tabs, and a zippered opening that extends from the neck opening to the lower porton of the left leg. There are two knit yoke-like inserts, one on each side of the front opening in the front chest and shoulder areas. According to the label on the garment, the woven outer shell and the quilted lining are 100 percent nylon, the batting between the lining and the outer shell is 100 percent polyester, and the pile fabric is acrylic and polypropylene. The exposed portion of the outer shell fabric has a somewhat shiny appearance. The importer states that the outer shell fabric has an acrylic coating. While added acrylic material may be the cause for the shiny surface of the outer shell fabric, such acrylic material is not readily visible by either the naked eye or under low-to-medium magnification.

Style No. 503 is a child's two piece snowsuit. The construction and materials in this two piece set are stated to be the same as in style 554, described above. The upper portion of the set is a short length jacket with pointed collar, long sleeves with knitted cuffs, a full front zippered opening, and nonfunctional side tabs simulating functional adjustment tabs. As with style 554, the collar is faced with an imitation fur pile fabric and the shoulder areas contain knitted inserts. The pants portion of the set is a bib-overall type garment with a front zippered opening and elasticized anklets.

In order to be classifiable under item 376.56, the garments must be "wholly or almost wholly of fabrics which are coated or filled, or laminated with rubber or plastics." Since it does not appear that the garments are made from fabrics which have been laminated with rubber or plastics, in order to fall under item 376.56 the garments must be wholly or almost wholly of fabrics that are coated or filled with rubber or plastics.

Headnote 2(a), Part 4C, Schedule 3, TSUS, defines the term "coated or filled" for tariff purposes as meaning that the materials applied to the textile fabric or textile article must visibly and significantly affect the surface or surfaces thereof otherwise than by a change in color. We have consistently interpreted Headnote 2(a) as requiring that the coating or filling materials must, in fact, be visible. This interpretation is in conformity with the legislative history of that headnote which refers to a change in the surface character of the fabric.

Since the plastic materials applied to the outer shell fabrics of the instant garments are not visible, those fabrics are not "coated or filled" for tariff purposes. Accordingly, the garments are not "wholly or almost wholly" of fabrics that are coated or filled and, therefore, are not classifiable in item 376.56.

The next question to be resolved is whether the simulated adjustment tabs on the sides of styles 503 and 554 constitute ornamentation for tariff purposes. The simulated adjustment tabs are made out of woven textile fabric. Textile fabric is one of the types of ornamentation specifically listed in Headnote 3, Schedule 3, TSUS.

Since the subject tabs, which are essentially decorative in nature, perform no function and their absence from the garments would not affect the integrity of those garments nor result in incomplete garments, in the absence of an exception to Headnote 3, Schedule 3, those tabs constitute ornamentation for tariff purposes, As an exception to the ornamentation rule, we have previously held that a decorative feature which simulates a functional feature on a garment is not normally ornamentation for tariff purposes if that decorative feature is no more decorative then the real feature that it is meant to simulate and if it is located where that functional feature is normally found. In this regard, to our knowledge, functional side adjustment tabs, as represented by the simulated tabs on the submitted samples, are not *usually* found on infants' short length jackets and infants snowsuits.

The fact that the ends of the tabs on the garments can be unstitched from the bodies of the graments and metal snap fasteners inserted into the tabs and garments has no bearing on the issue since, as imported, the tabs perform no functional purpose.

Since there are two pieces comprising style 503 and both pieces are matched as to color and fabric, we assume they will be sold at both wholesale and retail as a set and not separately. Therefore, that set is classifiable as an entirety for tariff purposes.

Accordingly, based on the above, all the submitted sample garments are properly classifiable in item 382.04, TSUS. You are hereby directed to deny the protest in full. Your file is being returned herewith.

Sincerely yours,
(Signed) JAMES W. O'NEIL
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–8)

Classification: Front-end Loader Sub-frame, Loader Bucket, and Snowbucket; Agricultural Implements; items 664.05, 666.00, TSUS

OCT 27 1977
CLA–2:R:CV:MA
053838 HL

District Director of Customs
Seattle, Washington 98714

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 30047000020

This letter concerns the protest filed against your decision classifying a set of sub-frames for a front-end loader under the provision for articles of iron or steel, not coated or plated with precious metal, other, in item 657.20, Tariff Schedules of the United States (TSUS), with duty at the rate of 9.5 percent ad valorem, and a snowbucket and a loader bucket for a front-end loader under the provision for mechanical shovels, coal-cutters, excavators, scrapers, bulldozers, and other excavating, levelling, boring, and extracting machinery, in item 664.05, TSUS, with duty at the rate of 5 percent ad valorem. The merchandise, manufactured by (company name) is covered by informal entry No. 4–593 of December 3, 1976, informal entry No. 533 of December 20, 1976, and CE 109884 of January 13, 1977.

The sub-frames are covered by Headquarters' letter dated August 18, 1976, file No. 046042 E, copy enclosed, and are classifiable as agricultural implements, not specially provided for, in item 666.00, TSUS, and entitled to free entry. That letter also indicates that a snowbucket, such as that in the instant case, is classifiable as a snow plow under item 664.05, TSUS, and dutiable at the rate of 5 percent ad valorem.

The loader bucket in question is 60 inches in length and has a stuck capacity of 12.25 cubic feet. Pursuant to Internal Advice No. 88/75 dated July 3, 1975, file No. 040175 E, front-end loader attachments with a capacity of ½ cubic yard or less should be presumed to be chiefly used in agricultural pursuits. Since the capacity of the subject loader bucket is less than ½ cubic yard, it is classifiable as an agricultural implement, not specially provided for, in item 666.00, TSUS, and entitled to free entry.

Accordingly, the protest filed in the informal entries should be allowed, and the protest filed in the formal entry should be denied. The entries and supporting documents are also enclosed.

Sincerely yours,
(Signed) A. P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–9)

Classification: Uncoated Black Calendered Paper for Electrostatic Copier

NOV 11 1977
CLA-2:R:CV:MC
053768 AL

Area Director of Customs
New York Seaport
New York, New York 10048

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 1001–6–005604.

This protest was filed on June 30, 1976, and was against your decision in the liquidation on April 9, 1976, of entry No. 468739 dated May 27, 1975, at the port of New York, New York. The importation was from West Germany. The merchandise covered by that entry consists of black calendered paper claimed for use as a base for copying machine.

This merchandise was classified by Customs officers under the provision for other papers, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated, in item 252.90, Tariff Schedules of the United States, (TSUS),

based on the fact that the imported paper, subsequently treated with a zinc oxide compound, becomes an electrostatic paper, and not a photographic light sensitive paper upon which an image is produced by the action of light, or chemicals, or radiant energy. The protestant contends that the imported paper is classifiable as paper impregnated, coated, or both, but not otherwise treated, in item 254.80, TSUS, or in the alternative, under the provision for basic paper to be sensitized for use in photography, in item 252.05, TSUS.

The merchandise is imported specifically for use in the (brand name) photocopier process. The protestant submits that this copier is an office photocopy machine, but contends that the machine performs a photographic function; the sensitized paper used in, and essential to, that function is clearly used in photography.

We understand that the merchandise is a special paper, designed to have a tightly controlled electrical resistivity. It was stated that while the specific components are a trade secret, they are a mixture of wood pulps plus carbon. A Customs laboratory report reveals that a sample of the merchandise showed no evidence of being coated or surface colored. This eliminates classification under item 254.80, TSUS.

(Brand name mfr.) supplied information that the imported paper is a black conductivized paper used in the (brand name) copier as a component of the photo receptor to act as a transfer medium to reproduce images on plain bond paper.

Information available to this Headquarters reveals that the merchandise is treated with zinc oxide and possibly other chemicals. The paper is then used in the copy machine as the electrostatic master; the optical image is projected to the master and transferred on to ordinary paper by applying an electrostatic field, and fixed on the paper by appropriate treatment.

This Headquarters previously has decided that electrostatic copy papers designed for use to produce copies on an electrostatic copier, which papers are coated but not heat sensitive and not containing silver salts, are classifiable under the provision for papers impregnated, coated, or both, in item 254.80, TSUS. The protestant cites *Westinghouse Electric International Co. v. United States*, C.D. 1411, which involved a type of photofluorographic camera, for the claim that "photographic cameras" in paragraph 1551, Tariff Act of 1930, as modified and amended, covered all cameras which take photographs. We do not agree that cameras and photography are used in the electrostatic copy machine. The imported paper is said to be a base paper for use "in coating OCE type photoconductive master

bands," which bands are used in an electrostatic copy machine to transfer an optical image to ordinary paper by applying an electrostatic field, and subsequent fixing. This is not photography which is covered in the heading "Basic paper to be sensitized for use in photography." For example, in the *Summaries of Trade and Tariff Information*, United States Tariff Commission, 1968, the following is contained relative to items 252.05, 254.05, and 256.13, TSUS:

> "This summary covers unsensitized base papers from which light sensitive papers are produced by special sensitizing treatments.
>
> "Based on end use and the specific sensitizing treatment employed, the papers considered here are classed into two groups:
>
> 1. Basic unsensitized paper, either coated with barium sulphate (baryta) or uncoated, used as the base for silver halide papers of the type ordinarily used for printing of pictures in photography, and
> 2. basic unsensitized papers, not coated, of the type ordinarily used in making blueprint and brown print papers.
>
> "The basic paper for the production of silver halide papers is manufactured to rigid specifications from cotton fiber pulp or highly purified wood pulps.
>
> Basic paper for the production of blueprint and brown print papers is made from cotton fiber pulp, chemical wood pulp or combinations thereof."

Further, the following description is from *The Dictionary of Paper*, 3rd edition:

> Photographic Paper. Paper used as the base material for the various photosensitive systems employing silver halide crystals as the light-sensitive receptors. This paper is always manufactured specifically for this end use from either cotton or highly purified wood cellulose. It must be free from all foreign substances and chemical impurities which would affect the photosensitive emulsion. Photograph papers must have sufficient wet strength to withstand processing in both acid and alkaline solutions. They are usually classified as (1) light weight, (2) single weight, (3) medium weight, and (4) doubleweight which covers a range of thicknesses from 0.0025 to 0.015 in. Most photographic paper is coated first with baryta (barium sulfate) to obtain a smooth high-reflectance surface on which the photosensitive emulsion is coated (up to 60 grams of baryta per square meter are used for high-gloss papers). Embossing rollers are sometimes used to obtain textured surfaces and calendering is often used to obtain a high-gloss surface.

The imported merchandise was properly classifiable under item 252.90, TSUS, and dutiable at the rate of 10 percent ad valorem.

Accordingly, you are directed to deny this protest in full.

Your file is returned herewith.

Sincerely yours,
(Signed) JAMES W. O'NEIL
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–10)

Classification: Derailleur Guards on Bicycles Included in Weight

DEC 27 1977
REFER TO
CLA–2:R:CV:MA
051194 JAS

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 30016 000262.

This protest was filed against your action in classifying certain 10 speed bicycles from Japan under the provision for bicycles having both wheels over 25 inches in diameter, weighing 36 pounds or over, complete without accessories, in item 732.24, Tariff Schedules of the United States (TSUS), dutiable at the rate of 11 percent ad valorem. The merchandise in question is covered by consumption entries 116468, 116742, 100605, and 104492, dated, respectively, December 6, December 8, and August 14, 1972, and July 3, 1974. The entries were liquidated on April 9, 1976.

Protestant, thru counsel, urges classification of the subject merchandise in the provision for bicycles having both wheels over 25 inches in diameter, weighing less than 36 pounds complete without accessories, in item 732.18, TSUS, dutiable at the rate of 5.5 percent ad valorem. The issue is whether the weight of a derailleur guard is to be included in determining the weight of the bicycle. If held to be a part of a bicycle, as found by your office, the weight of the derailleur is to be included in determining whether the bicycles weigh less than 36 pounds. It held to be an accessory, as protestant urges, the weight of the derailleur is to be excluded in determining the weight of the bicycles.

The derailleur guard is a steel mechanism affixed to the rear axle of a bicycle to protect the derailleur gear, an external gear mechanism attached to the rear hub of the bicycle. It is in the shape of a semi-

circular loop about 4 inches in diameter welded to a curved steel base about 2½ inches long. It weights approximately 4 ounces.

Counsel notes T.D. 68–77(16) in which derailleur guards were held to be parts of bicycles, separately classifiable in item 732.36, TSUS. However, he argues that the issue is not whether the derailleur guards are parts of bicycles for duty purposes, but whether they are *per se* parts or accessories with respect to the weight calculation. Counsel presents no evidence to support this claimed distinction. He cites *United States* (*Korlis Ltd., Party in Interest*) v. *The Westfield Manufacturing Company*, C.A.D. 803 (1962), wherein the issue was whether kickstands and lighting units were parts of bicycles (luggage carriers were clearly held to be accessories, and excluded from the weight of the bicycle). Counsel concludes that the derailleur guards are not parts of bicycles because, utilizing the court's announced standards, (1) they are not essential to the functioning of a bicycle, (2) there is no demand for them by the purchasing public, (3) the guards do not contribute to the safety and convenience of the rider, and (4) they do not afford an unlimited use of a bicycle. The court in *Westfield* noted that any one or all of these criteria could be significant in determining the issues. In the present case, since the derailleur gear is an external gear mechanism, any device utilized to protect that mechanism from damage would qualify as a part of that bicycle. By way of analogy, the trial court in *Westfield*, in holding a kickstand to be a part of a bicycle, stated that one of its purposes was to keep the cycle free from damage. The derailleur guard, in our opinion, serves the same purpose with respect to the derailleur gear. In serving this function the derailleur guard, in the words of the *Westfield* court, contribut[es] to the . . . convenience of the rider in the reasonable and normal operation of a bicycle . . ." The court cited *Trans Atlantic Company* v. *United States*, C.A.D. 758 (1960), where brackets for mounting door closers were held to be parts of those devices. In that case, the utility or function of the brackets, when used, was stressed. In our opinion, the utility of the derailleur guard as a protective device has been established. In our opinion, therefore, the derailleur guard is a part of a bicycle whose weight must be included in determining the weight of the bicyle.

Counsel cites a regulation promulgated by the Consumer Product Safety Commission (16 CFR 1512.9(b)) in concluding that derailleur guards are not considered by that agency to be safety items for bicycles. Without passing on the validity of counsel's conclusion, we view this regulation as irrelevant in our determination that derailleur guards are parts of bicycles, particularly in view of the cited case law.

Counsel cites section 159.22(a), Customs Regulations, in arguing that the net weight of merchandise dutiable by net weight shall be

determined insofar as possible by obtaining the actual weight. Counsel indicates that the bicycles were found by Customs to weigh slightly over 36 pounds apiece. He contends, however, that since the scales used to weigh the bicycles have a 1 percent accuracy differential, which differential could result in the actual weight of the bicycles being less than 36 pounds complete without accessories. This argument, we believe, has no merit. In *Pastene & Company, Inc. v. United States*, C.D. 1677 (1955), the court confirmed the proposition that weights officially determined by the district director and the method of weighing are presumed to be correct, but that the importer may rebut this presumption by showing the true weight of the merchandise. In the instant case, there has been no showing that the weights determined by the district director are incorrect. The statement that the scales have a 1 percent accuracy differential is unsupported by the record and has no probative value. Moreover, there has been no showing of what the true weights are claimed to be particularly since we hold the derailleur guards to be parts, and, therefore, includable in determining the weight of the bicycle. Counsel's argument on the weight differential is based on the presumption that the bicycles, without derailleur guards, weigh less than 36 pounds complete without accessories.

You are therefore directed to deny the protest in full.

Your file is returned.

Sincerely yours,
(Signed) A. P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–11)

Classification: Plastic Cigarette Dispenser as a Toy; item 737.95

DEC 20 1977
REFER TO
CLA-2:R:CV:MA
053949 JB

District Director of Customs
Seattle, Washington 98714

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 30017-000041

This ruling concerns the protest filed against your decision classifying a plastic cigarette dispenser from Hong Kong as toys, not specially provided for, other, under item 737.95, Tariff Schedules of the United States (TSUS), dutiable at the rate of 17.5 percent ad valorem. The merchandise is covered by Consumption entry dated June 14, 1976, which was liquidated on February 25, 1977.

The protestant claims that the merchandise, consisting of a plastic donkey which produces a cigarette from under its tail when its ears are pushed down, is not a toy and should be classifiable according to the material of chief value, which is plastic. Therefore, the cigarette dispenser should be classifiable as articles of plastic, not specially provided for, under item 774.60, TSUS, dutiable at the rate of 8.5 percent ad valorem.

The issue presented is whether the cigarette dispenser is a toy or whether it has a more utilitarian use and would therefore be classifiable as articles of plastic.

Under Headnote 2, Schedule 7, Part 5, Subpart E, TSUS, a toy is defined as any article chiefly used for the amusement of children or adults. The cigarette dispenser's label emphasizes the amusement factor of the article rather than its usefulness as a cigarette dispenser. It is our position that any dispensing features of the article are subordinated to its characteristics of amusement.

Accordingly, the protest is denied in full.

Sincerely yours

SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–12)

Classification: "Fun Snap" Noisemakers; item 737.65, TSUS

DEC 23 1977
REFER TO
CLA–2:R:CV:MA JB
054411

District Director of Customs
Seattle, Washington, 98714

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 30016-000503

This ruling concerns the protest filed against your decision classifying "fun snap" trick noise-makers from Brazil under the provision for fireworks, under item 755.15, Tariff Schedules of the United States (TSUS), dutiable at the rate of 12 cents per pound including the weight of all coverings, packing material and wrappings. The merchandise is covered by Consumption Entry No. 115864 dated September 3, 1976, which was liquidated on October 22, 1976.

The protestant claims that the merchandise is classifiable as confetti, paper spirals or streamers, party favors and noise-makers under item 737.70, TSUS, dutiable at the rate of 10 percent ad valorem. Under that classification, articles produced in Brazil would be eligible for duty-free treatment under the Generalized System of Preferences (GSP), as form A was submitted at time of entry.

The "fun snap" trick noise-makers are small spherical paper parcels containing a substance that enables the snapper to issue a loud noise when snapped, squeezed or thrown against a hard surface.

It is the opinion of this office that the "fun snap" trick noise-makers would be properly classifiable as practical joke articles under item 737.65, TSUS, dutiable at the rate of 10 percent ad valorem.

In order to be classified under item 737.65, TSUS, the "fun snap" noise-makers must be shown to place an individual at a humorous disadvantage and must be shown to be chiefly used as practical joke articles. Because of the loud noise they issue when detonated, the "fun snap" noise-makers startle and frighten their victims and put them at a humorous disadvantage. The merchandise is chiefly used in this practical joke manner.

Accordingly, the protest as to classification under item 737.70, TSUS, should be denied but the entry should be reliquidated classifying the merchandise under item 737.65, TSUS, with an appropriate refund of duty as claimed.

Sincerely yours,
(Signed) A. P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–13)

Classification: Sisal Fiber Plant Hangers; item 365.82, TSUS

JAN 18 1978
REFER TO
CLA–2:R:CV:MC
051193 EA

District Director of Customs
Baltimore, Maryland 21202

Dear Sir:

Re: Decision on Application for Further Review of Protest Nos. 1303–6–000119 and 1303–6–000142

This decision concerns a protest timely filed against your decisions in the liquidations of May 14, 1976, of entry No. 130086 dated January 9, 1976, and of June 11, 1976, of entry No. 126557 dated December 18, 1975, at the port of Baltimore.

These protests involve the classification of sisal fiber plant hangers imported from Taiwan. A sample was submitted. The sample consists of a plant hanger, 42 inches long, composed of sisal fiber twisted into cord. There are four lengths of 2-ply cord doubled over at the top to form loops. The four sets of doubled cord are bound together by single lengths of cord approximately 2 inches from the top and 7½ inches and 9 inches from the bottom. Between the two bottom binds the fiber extends from the cords, unspun, and surrounds additional unspun fiber to form a ball. The unspun fiber extends below the bottom bind, for approximately 7 inches to form a fringe. The four sets of doubled cord are individually knotted at lengths of approximately 5¼ inches and 11½ inches above the ball.

The merchandise was classified under the provision for lace or net furnishing, whether or not ornamented, and other furnishings, ornamented, of vegetable fibers, other, in item 365.82, Tariff Schedules of the United States (TSUS), dutiable at the rate of 20 percent ad valorem. The protestant, (name) claims that the merchandise is properly classifiable under the provision for articles not specially provided for, of unspun fibrous vegetable materials, other, in item 222.64, TSUS, dutiable at the rate of 5 percent ad valorem. The protestant raises the following points in support of his claim: 1) Classification in Schedule 3 is inappropriate for *unspun* sisal fiber; 2) The headnote definition of "furnishings" in the tariff schedules does not contemplate the inclusion of plant hangers.

Protestant's first point is based on the language of General Headnote 1(i) of Schedule 3 which is as follows: "This schedule does not cover

articles of unspun fibrous vegetable materials (see Part 2b of Schedule 2)". Headnote 2(d), Subpart B, Part 2, Schedule 2 defines "unspun fibrous vegetable material" as "bamboo, rattan, willow chip, straw, palm leaf, grass, seagrass and similar fibrous vegetable substances, which have not been spun. The United States Customs Court has made the determination, in several cases before it, that sisal is not a fibrous vegetable substance similar to those enumerated in the headnote. See *Continental Importing Co.* v. *United States*, 63 Cust. Ct. 341, C.D. 3917 (1969); *B. A. McKenzie & Co., Inc.* v. *United States*, 63 Cust. Ct. 110, C.D. 3883 (1969).

In those cases, the court reasoned that the term "vegetable fiber" is defined in contrast to the term "unspun fibrous vegetable materials" in Headnote 1(a), Subpart B, Part 1, Schedule 3, as "vegetable fiber which *can be spun* . . ." (emphasis added). Moreover, under Part 1 of Schedule 3, sisal fiber is expressly provided for under the provision for vegetable fibers . . . . . processed, but not spun, sisal, in item 304.48, TSUS.

Therefore, it appears that under the tariff schedules the term "unspun fibrous vegetable matter," in General Headnote 1(i) of Schedule 3, does not refer to all unspun fibers of a vegetable origin but is limited to those materials within the scope of the term as defined in Schedule 2, Part 2, Subpart B, Headnote 2(d). It further appears that sisal fiber because it is a spinnable fiber, is more properly a "vegetable fiber" within the meaning of Headnote 1(a), Subpart B, Part 1, Schedule 3, whether or not it is in fact spun.

With regard to the issue of "furnishings," this term is defined in Headnote 1, Subpart C, Part 5, Schedule 3, as follows:

"For the purposes of this subpart, furnishings means curtains and drapes, including panels and valences, towels, napkins, tablecloths, mats, scarves, runners, doilies, centerpieces, antimacassars, and furniture slipcovers; and like furnishings, all the foregoing, of textile materials and not specially provided for."

In the case of *Morimura Bros.* v. *United States*, 2 Cust. Ct. Appls. 181, T.D. 31941 (1911), the court stated on p. 182: "House furnishings on the other hand are the subsidiary adjuncts and appendages of the house, designed for its ornamentation or which are of comparatively minor importance so far as personal use, convenience, and comfort are concerned." See also *Barth & Dreyfuss* v. *United States*, 62 Cust. Ct. 86, C.D. 3685 (1969).

In light of court interpretations of the headnote provision defining furnishings, it appears that plant hangers are includable in this provision. As you have noted, it has been the practice of the Customs Service to classify sisal plant hangers in the past under the provision for . . . other furnishings, ornamented, of vegetable fibers, other,

in item 365.82, TSUS, dutiable at the rate of 20 percent. This administrative practice is in accord with the cited judicial precedent.

You are therefore directed to deny the protest in full.

Your file is returned herewith.

Sincerely yours,
(Signed) JAMES W. O'NEIL
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–14)

Classification: Conveyor Chain with Attachments; item 652.35, TSUS

JAN 20 1978
REFER TO
CLA–2:R:CV:MA
054731 HL

Regional Commissioner of Customs
New York, New York 10048

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 1001–7–002666

This ruling concerns the protest filed against your decision in liquidating on April 22, 1977, entry No. K29664 of April 1, 1977, covering certain chain and attachments imported through the port of New York at JFK Airport, and classifying this merchandise under the provision for chain and chains, of iron or steel, other, including parts, in item 652.35, Tariff Schedules of the United States (TSUS), with duty at the rate of 9.5 percent ad valorem.

The protest claimed that the subject merchandise, described as C-class chain, No. 102–½ with attachments, and used as a conveyor chain, is classifiable under either item 652.15 or 652.18, TSUS, as chain and chains, of iron or steel, used for the transmission of power, each with duty at the rate of 6 percent ad valorem, depending upon the pitch size, number of parts per pitch, and value per pound. It is the contention of the protestant that the addition of attachments to the chains, for the purpose of carrying objects on a conveyor does not compromise the use of such chains to transmit power from the original drive motors.

In the alternative, protestant claims that the subject merchandise has been the subject of an established and uniform practice under which chains with attachments, nearly identical to those in issue, were imported by protestant and classified as chains used for the transmission of power under item 652.15 or 652.18, TSUS. In support of this contention, protestant submits a schedule of seventeen entries beginning in August of 1974 and ending in December of 1976, at which time the chains were classified under item 652.35, TSUS. All but one of these importations were made through the Port of New York.

It is your position that the addition of attachments to the subject chains renders the chains unsuitable for the transmission of power. You also state that no established and uniform practice exists pertaining to the classification of the subject merchandise.

In support of its first contention, protestant cites the decision of the United States Customs Court in *Border Brokerage Company* v. *United States*, 58 Cust. Ct. 228, C.D. 2947 (1967), in which H-class pintle chain links used for conveying logs or other material from one point to another in sawmills, pulpmills, and in the construction industry, were held to be parts of chains used for the transmission of power. The court stated that conveyor chains and chains used for the transmission of power are indistinguishable, and that conveyor chains are used for the transmission of power. It is pertinent to note, however, that the merchandise before the Customs Court consisted of chain links without attachments, and is hence distinguishable from the subject merchandise.

In Internal Advice Request No. 375–75, Supp. 1, dated September 26, 1977, file No. 053216 E, we held that attachments added to H-class pintle conveyor chain links changed their use from chain used for the transmission of power to the specific use of moving logs in a conveying process. ORR Ruling 174–71 dated January 27, 1971, file No. MFG 424.440, abstracted as T.D. 71–83(19), holding H-class and C-class pintle chain chiefly used in the United States with conveyors to be classifiable as chain used for the transmission of power, was thus inapplicable.

Note also Protest Review Decision dated September 15, 1977, file No. 046716 E, in which slat bed conveyor chain with attached spaced slats to carry objects that would damage the conveyors belt because of sharp edges or heavy weights, was held to be classifiable under item 652.35, TSUS. This result followed from the fact that the primary function of those chains was to transport lumber, knots, and sawdust, rather than to transmit power.

In light of the foregoing, the subject chains with attachments, primarily used to carry objects rather than to transmit power, are precluded from classification under item 652.15, or 652.18, TSUS, as chain used for the transmission of power.

In regard to protestant's alternate contention, the instant merchandise has never been the subject of any Headquarter's letter or ruling. That sixteen importations were classified as chains used for the transmission of power does not result in an established and uniform practice under which notice is required before change. Part 177.10(c), Customs Regulations; 19 U.S.C. 1315. See *Washington Handle Company* v. *United States*, 34 CCPA 80, C.A.D. 346 (1946), in which twenty-eight shipments did not result in an administrative practice. It also appears that the seventeenth entry was classified under item 652.35, TSUS, of which protestant had notice prior to the importation of the merchandise which is the subject of this protest.

In addition, the same issue pends before the United States Customs Court under Civil Actions 76–2–00407, 76–1–00141, and 76–8–01876.

Accordingly, the protest should be denied in full.

Sincerely yours,
(Signed) A. P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

(P.R.D. 78–15)

Classification: Downrigger (A Winch with Attachments) Used for Fishing; item 731.60, TSUS

JAN 23 1978
REFER TO
CLA–2:R:CV:MA
054629 HL

District Director of Customs
Seattle, Washington 98714

Dear Sir:

Re: Decision on Application for Further Review of Protest No. 30046000154

This ruling concerns the protest filed against your decision classifying downriggers under the provision for equipment designed for sport fishing, fishing tackle, and parts of such equipment, and tackle, all the foregoing not specially provided for, in item 731.60, Tariff

Schedules of the United States (TSUS). The merchandise is covered by Consumption entry No. 4–130727 of July 2, 1976, liquidated on July 30, 1976, and Consumption entry No. 4–121624 of March 19, 1976, liquidated on August 6, 1976.

The protest claimed that the downrigger is a winch, and classifiable under the provision for hoists, winches, pulley tackle, and other lifting, handling, loading or unloading machinery, in item 664.10, TSUS. A winch is defined in Webster's New World Dictionary (2d ed. 1972) as "an apparatus operated by hand or machine, for hoisting or hauling, consisting of a drum or cylinder upon which is wound the rope or cable which is attached to the object to be lifted or moved."

A downrigger is a device designed to be used in conjunction with light fishing tackle. It enables the fisherman to drop lures down to measured depths. The subject downrigger consists of a crank handle attached to a large spool or drum around which a wire line is stored. At the end of the wire line a lead weight will be tethered. When the handle is turned by hand, the lead weight is lowered into the water from an arm extending from beneath the spool or drum. While the weight is lowered to a desired depth where the fish are thought to be, a positive drive counter measures depth in one-foot increments from 0 to 999. By means of a release clip mechanism, the lead weight carries down with it the line and lure of a separate tackle. When a fish strikes at the lure, the line with lure is pulled free of the lead weight which can then be raised by turning the handle.

It is your contention that the subject downrigger constitutes fishing tackle for the following reasons: (1) the downrigger serves to hold a fishing line in proper position and is necessary for catching fish; (2) the descriptive literature submitted does not refer to the downrigger as a winch; and (3) the downrigger does not lift or hoist various articles as does a winch.

It is clear that the basic mechanism of the downrigger is a winch for the raising and lowering of the lead weight to different depths. When the release clip mechanism and lead ball weight are added to and used in conjunction with the winch, the resulting article is "more than" a winch. It then constitutes fishing gear or tackle to aid the fisherman in catching fish. The record shows that the winch, release clip mechanism, and lead ball weight are sold together as a unit. The record also indicates that at least the winch and release clips are imported together in the same shipment.

The subject merchandise should be considered a single entity for tariff purposes pursuant to the doctrine of entireties, and classifiable as fishing tackle under item 731.60, TSUS.

Assuming that the subject merhcandise is a winch classifiable under item 664.10, TSUS, classification thereunder nonetheless would be precluded in view of Headnote (1)(V), Schedule 6, Part 4, TSUS, which provides that "articles and parts of articles specifically provided for elsewhere in the schedules" will not be covered in Part 4 wherein item 664.10, TSUS, is found. Since the downrigger is within the provision for fishing tackle, classification would be under item 731.60, TSUS, and not 664.10, TSUS.

Accordingly, the protest should be denied.

Sincerely yours,
(Signed) A. P. SCHIFFLIN
For SALVATORE E. CARAMAGNO
Director
Classification and Value Division

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4740)

AMERIMEX CORPORATION *v.* UNITED STATES

Cotton yarn

EXPORT VALUE—INLAND FREIGHT CHARGES

Cotton yarn of various sizes imported from Mexico was appraised on the basis of export value pursuant to section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. The parties are in accord on the basis of value but disagree as to whether or not inland freight charges were properly included as part of the dutiable value of the imported merchandise.

Since the record is devoid of any evidence having probative value in support of its position, plaintiff has failed to meet its

burden of proof. *Held*, accordingly, the proper values are the appraised values.

Court Nos. R69/1527, ect.

Port of Wilmington, N.C.

[Judgment for defendant.]

(Decided May 4, 1978)

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston (*Mark R. Bernstein*, of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

RE, Chief Judge: The question presented in these seven cases, consolidated for purposes of trial, pertains to the correct dutiable value of certain merchandise imported by plaintiff from Mexico from 1965 to 1969. The merchandise, consisting of cotton yarn of various sizes, was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. § 1401a(b)).

Both parties agree that export value, as provided in the statutory definition, is the proper basis for appraisement. The merchandise, exported by seventeen different companies, is the subject of 281 entries, 73 of which were subject to a *per se* appraisement.

The entry papers show that the appraising officer appraised the remaining 208 entries at the invoiced unit values "plus item marked 'X', less 1.5¢ per gross lbs. net pkd." The item marked "X" varied by entry, and was either designated "freight and expenses," "frt.," "shipping," "charges and freights," "custom expenses and freight," "other expenses," or "expenses per pound."* It is agreed that these items represented inland freight charges.

No question is raised as to the invoiced unit values. The principal question presented is whether the inland freight charges were properly included as part of the export value of the imported yarn.

The parties agree on the dates of notices of appraisement and the receipt of appeals for reappraisement. Although there is a question on the dates of notice and receipt of appeal for reappraisement in Court No. R69/1527, the defendant has raised no issue as to its timeliness. From an examination of the pleadings, the court has concluded that these appeals are timely.

*Some entries set forth "F.O.B." Puebla prices; others read "Price F.O.B. Mexico." "F.O.B. Warehouse Hilados la Esperanza, S.A."

At the trial, plaintiff abandoned its appeals as to the 73 entries that showed a *per se* appraisement. Consequently, they are severed and dismissed.

Export value is defined in section 402(b) of the Tariff Act of 1930, as amended, as follows:

> "(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States."

By this action, plaintiff seeks to have the merchandise reappraised at the invoiced unit values. It contends that "export value" should not include the cost of freight from the plant, where the yarn was manufactured and sold to plaintiff, to Laredo, Texas, since on the dates in question, the imported cotton yarn was available to the plaintiff and other importers on an f.o.b. factory basis. Hence, plaintiff asserts that the "Laredo Freight" was not a part of either the statutory cost of production, or the export value of the imported merchandise. It relies on *Pacific Wood Products Company* (*James G. Wiley Co.*) v. *United States*, 59 Cust. Ct. 688, R.D. 11369, 277 F. Supp. 122 (1967); *Standard Brands Paint Co., Inc.* v. *United States*, 62 Cust. Ct. 808, R.D. 11628, 295 F. Supp. 1096 (1969); and *Hub Floral Manufacturing Company* v. *United States*, 62 Cust. Ct. 979, A.R.D. 249, 296 F. Supp. 355 (1969), *aff'd*, 57 CCPA 134, C.A.D. 993, 428 F.2d 848 (1970).

At the trial, Mr. Sanford Rosenthal, plaintiff's vice president and treasurer, was its sole witness. In support of its position, plaintiff endeavored to establish that, in each instance, it negotiated the price of cotton yarn with Mexican mills at an f.o.b. factory price; that the mills sold yarn to all purchasers at f.o.b. factory prices; and that the mills never conditioned the sale on the purchaser buying at f.o.b. Laredo prices.

Plaintiff offered into evidence the affidavit of Mr. Ernesto Chedraui, the general director of Textiles Agua Azul, S.A., one of the seventeen exporters of the imported merchandise Defendant objected on the grounds that there was evidence that Mr. Chedraui was reasonably available to testify at the trial; that service of his "affidavit" one week

before the trial was contrary to the language and intent of 28 U.S.C. § 2635(b), and Rule 9.6 of the Customs Court; and that the affidavit was not an affidavit within the purview of the hearsay exception set forth in section 2635(b) since it was notarized by a notary of a foreign country without consular certification or dual notarization. At the request of plaintiff's counsel, the court granted time to obtain consular certification or dual notarization, and reserved ruling on the admissibility of Mr. Ernesto Chedraui's affidavit.

Plaintiff's counsel subsequently advised the court by letter that plaintiff had diligently attempted to have Mr. Chedraui submit a new affidavit, but was unsuccessful since Mr. Chedraui was reluctant to become involved in this litigation. Plaintiff thereupon resubmitted the affidavit proffered at the trial. Counsel also submitted the affidavit of Mr. Antonio Chedraui, who held the same position with Textiles Agua Azul, S.A., as did Mr. Ernesto Chedraui.

Defendant has objected to the introduction of Mr. Antonio Chedraui's affidavit on the ground that it was offered after the case had been tried and submitted for decision. In support of its position defendant cites Rules 9.6 (a) and (b) and Rule 10.4 of the Rules of the United States Customs Court. Indicating that plantiff 6½ months have the affidavit properly executed, the defendant renews its objection to the introduction of the affidavit of Mr. Ernesto Chedraui.

The threshold question presented pertains to the admissibility of the two affidavits proffered by plaintiff. In customs litigation in which the value of imported merchandise is in issue, the pertinent statute provides that, in addition to other admissible evidence, affidavits of persons "whose attendance cannot reasonably be had, may be admitted in evidence when served upon the opposing party in accordance with the rules of the court." 28 U.S.C. § 2635(b)(1). *See also* Rule 9.6(a), Rules of the United States Customs Court.

Rule 9.6(b) prescribes the manner of service:

> "(b) *Service:* A copy of any report, deposition or affidavit described in paragraph (a) of this rule which is intended to be offered in evidence shall be served on the opposing party with the notice of trial. A party other than the party serving the notice of trial shall serve a copy of any such report, deposition or affidavit which he intends to offer in evidence upon the opposing party within 15 days after service of the notice of trial. Timely service of copies of such documents may be waived or the time extended upon consent, or by order of the court for good cause shown."

Consequently, in customs valuation cases, affidavits of persons whose attendance cannot reasonably be had are admissible into evidence. However, when timely objection is made, on the ground that

the affiants could reasonably have attended the trial, the objection should be sustained. *See United States* v. *Rodier, Inc.*, 23 CCPA 336, T.D. 48196 (1936); *United States* v. *Hensel, Bruckmann & Lorbacher, Inc.*, 2 Cust. Ct. 846, R.D. 5423 (1939), *decided on remand*, 4 Cust. Ct. 630, R.D. 4728 (1940), *aff'd*, 6 Cust. Ct. 832, R.D. 5161 (1941); *United States* v. *Clayton Chemical & Packaging Company*, 52 CCPA 111, C.A.D. 867, 357 F. 2d 1009 (1965), *remanded* 383 U.S. 821, 86 S. Ct. 1128 (1966) for the purpose of enabling the importer to fill the evidentiary void by presenting other types of proof available to it.

Subsection (b) of 28 U.S.C. §2635, as amended, is derived from former section 2633 of title 28. In the *Clayton Chemical & Packaging Company* case, the Court of Customs and Patent Appeals discussed the prior section which had been broadened to embrace persons "whose attendance cannot be reasonably had" irrespective of their residence. The court stated that whether attendance may reasonably be had is a factual question to be determined by the court, and reaffirmed the reasoning of *United States* v. *Hensel, Bruckmann & Lorbacher, Inc.*, 2 Cust. Ct. 846. R.D. 4523 (1939). The appellate court quoted the following statement of the Customs Court:

> "The language [28 U.S.C. §2633] is plain that affidavits may be admitted of persons whose attendance cannot reasonably be had. It is our opinion that, when timely objection is made to the admissibility thereof upon the ground that the attendance of the affiants might be had in court, such objection should be sustained unless and until a proper showing is made upon the part of the party offering the affidavits that the attendance at the trial of the persons executing the same cannot reasonably be had. In the event of such a showing being offered or made, it is for the court to determine whether they are to be admitted or excluded.
>
> Here timely objection was taken to the admission of the affidavits upon said grounds and no offer or showing was made that attendance could not reasonably be had. Under such conditions the trial court should have excluded the affidavits." 52 CCPA at 119.

Plaintiff failed to serve a copy of Mr. Ernesto Chedraui's affidavit either with its original notice of trial of November 4, 1974, or the subsequent notice of trial served by mail on October 31, 1975. One week before trial, on December 23, 1975, plaintiff filed a motion to allow it to offer into evidence Mr. Ernesto Chedraui's affidavit, which had been prepared after the last notice of trial had been served and filed. It was only at that time that the defendant received the affidavit that plaintiff sought to introduce into evidence.

On *voir dire*, Mr. Rosenthal testified that, during his trips to Mexico, Mr. Ernesto Chedraui previously declined to submit an

affidavit in this case. It was only a few months before trial that Mr. Rosenthal was advised that Mr. Ernesto Chedraui was willing to execute an affidavit. The record shows that the affiant, Mr. Ernesto Chedraui, had been in Mr. Rosenthal's offices in Charlotte, North Carolina, two to three weeks prior to trial. No subpoena was served upon Mr. Chedraui.

Mr. Ernesto Chedraui is general director of one of the plaintiff's suppliers, and although he was reluctant to provide an affidavit, he could have been subpoenaed when he was in Charlotte. The explanation given by Mr. Rosenthal, as well as the explanation set forth in plaintiff's moving papers, are insufficient to deprive the defendant of its right of confrontation and cross-examination of plaintiff's witness. On the facts presented the court finds that neither the provisions of 28 U.S.C. § 2635(b) not those of the applicable rule have been met. Accordingly, the defendant's objection to the introduction of the affidavit of Mr. Ernesto Chedraui is sustained.

Mr. Antonio Chedraui's affidavit was mailed to the court on June 15, 1976, about 5½ months after this case was tried and submitted. It was executed on May 12, 1976 before Notary Public Janice Dale Goins, and bears a notary seal of Mecklenburg County, North Carolina. Neither plaintiff's attorney nor Mr. Antonio Chedraui in his affidavit offers any explanation why Mr. Chedraui could not reasonably have attended the trial. Clearly the affidavit was not served in accordance with Rule 9.6(b). Since it does not meet the requirements of the pertinent statute and rule of this court, it is inadmissible, and the defendant's objection is sustained.

No witnesses were called on behalf of the defendant. Defendant's case rests on exhibits B and C, collective exhibit D, and the statutory presumption of correctness that attaches to the appraisement. 28 U.S.C. § 2635(a).

Exhibit B is a copy of an irrevocable letter of credit for plaintiff's account, dated January 31, 1966, from the North Carolina National Bank to Lonas el Leon, S.A., Puebla, Mexico. It is illustrative of letters of credit issued to the various exporters by plaintiff before the imported merchandise could be shipped to the United States. The letter of credit included a price or amount that was 100% of the invoice value of the merchandise covered by entry No. 847–E, less customs duties. Exhibit C is a letter dated March 11, 1966 from plaintiff to U.S. Customs. It is attached to the special customs invoice for entry No. 761–E, and deals with the price plaintiff paid the exporter/seller of the merchandise, and the terms of sale. It is illustrative of the type of information Mr. Rosenthal supplied the customs officials for the imported merchandise. Collective exhibit D consists of 16 other letters

to U.S. Customs, signed by Mr. Rosenthal and submitted with entry papers, which are illustrative of the manner in which plaintiff described the purchases of the imported merchandise.

Plaintiff relies on the judicially established principle that, for appraisement purposes, inland freight charges are part of dutiable value if the merchandise can only be purchased in the principal markets of the exporting country for exportation to the United States at prices which include those charges. Conversely, if it can be shown that the merchandise was freely offered for exportation in the principal markets at prices which excluded inland freight charges, they are not part of dutiable value. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958), citing *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 533 (1954) *cert. denied*, 348 U.S. 823, 75 S. Ct. 37 (1954). Hence, plaintiff has attempted to establish that, in each instance, it negotiated the price of the merchandise at an f.o.b. factory price; that the Mexican mills sold yarn to all purchasers at f.o.b. factory prices; and that it never conditioned the sale on the purchaser buying f.o.b. Laredo prices. It submits that the law is clear that the "export value" of the imported merchandise does not include inland freight charges.

Mr. Sanford Rosenthal testified for the plaintiff to the following effect: During the period 1965–1969 plaintiff was primarily engaged in importing cotton yarn from Mexico, and during those years he negotiated for 2 to 2½ million pounds of yarn from Mexico. He had negotiated for the purchase of the imported yarn for plaintiff in Mexico, and had dealt with approximately 20 mills in Mexico that exported yarn to the United States. The price paid by plaintiff for the yarn was based on f.o.b. factory, Puebla, and did not include inland freight from the factory to Laredo, Texas.

Mr. Rosenthal stated that he was personally aware of the prices that the Mexican manufacturers were charging other American importers as well as plaintiff during this period, as he had seen the competitors' invoices, and had visited and conversed with them. He said that during the pertinent period negotiations made by him with Agua Azul were made on the basis of net f.o.b. factory. In each instance the price was determined as to the base net price, i.e., net f.o.b. factory, and freight to Charlotte, North Carolina, was added for mutually agreed upon conveniences. During the period in which Mr. Rosenthal was negotiating with the Mexicans, and doing business in Mexico, he said no Mexican yarn exporter required that he purchase yarn on the basis of f.o.b. Laredo as a condition of doing business. No Mexican yarn exporter ever informed or advised him that American yarn importers could only purchase yarn in Mexico on the baiss of f.o.b. Laredo.

On cross-examination Mr. Rosenthal conceded that an f.o.b. factory price with charges to the destination could be considered a c.i.f. (i.e., cost, insurance, freight) sale. He stated that when the price for the merchandise and other terms of sale were agreed upon, he would send Agua Azul an irrevocable letter of credit for the full amount on the invoice less customs duties. The invoice did not include an amount for freight from Agua Azlu's mill to the Neuvo Laredo border; freight was to be prepaid to Charlotte. Each and every invoice in this case included an amount for freight from the Mexican mills to Charlotte. Mr. Rosenthal testified that he sent irrevocable letters of credit to the Mexican mills, as illustrated by defendant's exhibit B, before the merchandise could be shipped to the United States. They included a price or amount that was 100% of the invoice value of the merchandise shipped to him less customs duties.

Mr. Rosenthal's company obtained physical possession of the merchandise at Charlotte. As to its transportation, he testified that the various Mexican mills hired the carrier that transferred the merchandise from the factories to the Nuevo Laredo border; that Mexican sellers prepaid all of the documents necessary for shipment to that point under an agreement with plaintiff; and that Mexican exporters hired a customhouse broker, J. O. Alvarez, to take care of the transit from Nuevo Laredo to Charlotte. The merchandise shipped by Agua Azul was insured against any loss or theft occurring before it reached the Nuevo Laredo border. Plaintiff hired the insurance company that covered the shipment. Shipments from the Mexican mills to Charlotte were cost and freight shipments.

Exhibit C was read into evidence:

> "Attached to Special Customs Invoice to explain difference in total dollar import value.
> This is to advise that the price per pound of 28/1 carded cotton yarn of 54¢ per pound has been inflated for purpose of a subsidy received by the producing mill. *Our purchase price is to include freight prepaid to Laredo, Texas.* The mill has added to this price to reflect freight paid to Charlotte, N.C. from Laredo, Texas of 1½¢ per pound and the U.S. Customs duties of 5½¢ per pound.
> We are paying the Customs Duties ourselves and the Letters of Credits we issue to the mills reflects this. They must deduct this amount from the draft before payment will be made.
> Accordingly we have figured duties based on 47¢ per pound at 10.8% ad valorem." (Emphasis added.)

Other similar letters had been sent to U.S. Customs (collective exhibit D), and counsel stipulated that "they were all signed by the client and submitted with the entry papers."

Mr. Rosenthal testified that invoices to other American importers that he had seen were, to the best of his knowledge, "F.O.B. the mill." His recollection, however, was hazy. He named the merchandise as cotton, but could not tell the ply of the yarn, the yarn number, the name of the importer, the date of invoice, or the shipment destination.

On redirect examination, Mr. Rosenthal testified further as follows: that freight and tariff added to the invoices were at the request of the Mexican producer; that the Mexicans did not condition the sale of yarn to include the cost of freight and tariff to Charlotte; that the sale was consummated on the basis of "F.O.B. the factory" price; and that the means of transportation chosen by the mill was at his request. Counsel for plaintiff pointed out that there was only one railroad in Mexico.

The question presented is whether the inland freight charges, i.e., the costs incurred in transporting the imported merchandise from the factory to the port of export, are part of its dutiable value.

In accordance with the statutory definition, export value is the price at which the merchandise is freely sold or offered for sale in the principal markets of the country of exportation, plus, when not included, the cost of packing and other expenses incidental to making it ready for shipment. Charges accruing subsequently, such as the cost of inland freight, are not part of the merchandise *per se*, and are not ordinarily part of export value. The court must, therefore, ascertain whether the merchandise was ever sold or offered for sale at prices which did not embrace those charges.

The basis for determining whether inland charges are a part of export value of imported merchandise was discussed at length by this court in *Hub Floral Manufacturing Company* v. *United States*, 62 Cust. Ct. 979, A.R.D. 249, 296 F. Supp. 355 (1969), *aff'd*, 57 CCPA 134, C.A.D. 993, 428 F.2d 848 (1970):

> "The rule for determining whether or not inland charges are a part of the export value of imported merchandise derives from the holding in the cases of *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553; *Albert Mottola, etc.* v. *United States*, 46 CCPA 17, C.A.D. 689, that such value includes the charges, if the merchandise is *never* offered for sale or sold at any price exclusive of the charges. Where, however, the merchandise is offered for sale or sold on an ex-factory basis, the factory being the principal market, at a price which does not include the charges, they are not to be considered a part of the statutory value of the merchandise. *United States* v. *Lyons*, 13 Ct. Cust. Appls. 639, T.D. 41484. Since the statutory definition of export value is framed to reach a price in the principal market

> of the country of exportation of "merchandise in condition, packed ready for shipment to the United States," it is clear that it does not ordinarily contemplate the inclusion of charges incurred subsequent to that time and place, and the *Straub* and *Mottola* cases, *supra*, are predicated upon the exceptional showing that the only price in the principal market is the one which includes the charges. For the reason that such charges are said to be inextricably bound up with the cost of the merchandise and incapable of separation therefrom, they form an integral part of the unit value of the merchandise. But especially since such transactions with the inevitable consequence of inseparability represent the exception rather than the rule, the courts are disposed to adopt a lenient view toward the quantum of proof requisite to establish exfactory sales exclusive of disputed charges. *United States* v. *Dan Brechner & Co.*, 38 Cust. Ct. 719, A.R.D. 71, affirming *Dan Brechner & Co.*, v. *United States*, 36 Cust. Ct. 612 Reap. Dec. 8599; *United States* v. *Supreme Merchandise Company*, 48 Cust. Ct. 714, A.R.D. 145; *United States* v. *Gitkin Co., supra, United States* v. *Bud Berman Sportswear, Inc., surpa*; *United States* v. *Chadwick-Miller Importers, Inc., et al., supra.*" (Emphasis in original.) 62 Cust. Ct. at 984–85.

In the case at bar, the defendant has conceded that the appraisements are separable. Accordingly, plaintiff may challenge the charges based upon inland freight, and still rely upon the presumption of correctness of the appraiser's valuation for the unchallenged items. *United States* v. *Imperial Products, Inc.*, 65 CCPA, C.A.D. 1203, 570 F.2d 337 (1978); *United States* v. *H. M. Young Associates, Inc.*, 62 CCPA 20, C.A.D. 1138, 505 F.2d 721 (1974); *Standard Brands Paint Co., Inc.* v. *United States*, 62 Cust. Ct. 808, R.D. 11628, 295 F. Supp. 1096 (1969).

It was incumbent upon plaintiff to establish that its merchandise was sold or freely offered for sale *to all purchasers* at the "ex-factory" price exclusive of the disputed inland freight charges. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958).

The record, however, only establishes the manner in which plaintiff purchased the subject yarn. Mr. Rosenthal testified that plaintiff purchased the importations at f.o.b. factory prices, which did not include inland freight charges from the factory to Laredo, Texas; that duties and freight charges, prepaid to Charlotte, North Carolina, were added as a convenience to both parties. Letters from plaintiff to U.S. Customs, however, specifically state: "Our purchase price is to include freight prepaid to Laredo, Texas." (Exhibits C and D.)

There is no evidence in the record of actual sales, or of offers of sales, of "such or similar merchandise" at the invoice prices exclusive of the disputed inland freight charges. Mr. Rosenthal testified that no Mexican yarn exporter at any time informed him or advised him

that American yarn importers could only purchase yarn in Mexico on the basis of f.o.b. Laredo. Although he said that he had seen invoices to other American importers which were "F.O.B. the mill," he could not be specific or give any details. Furthermore, other than Textiles Agua Azul, S.A., he offered no evidence with respect to the seventeen exporters to establish that they sold or freely offered for sale such or similar merchandise to *all* purchasers in accordance with the statutory provisions for export value. Apart from the attempt to introduce the inadmissible affidavits of two directors of Textiles Agua Azul, S.A., the record is devoid of any evidence having probative value in support of plaintiff's position.

In customs reappraisement cases, it is too well established to require citation of authorities that, to prevail, the plaintiff must bear its burden of proof. Plaintiff must overcome the statutory presumption of correctness attaching to the value found by the appraiser, and must establish the correct dutiable value of the merchandise. In this case, plaintiff has not met its burden of proof.

Since plaintiff has failed to meet its burden of proof in rebutting the presumptively valid appraisements, the appraised values are affirmed, and these appeals for reappraisement are dismissed.

Judgment will be entered accordingly.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decision

DEPARTMENT OF THE TREASURY, *May 8, 1978.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/62	Ford, J. May 3, 1978	International Harvester Company et al.	77-8-01480, etc.	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Buffalo-Niagara Falls (Buffalo) Tractors suitable for agricultural use

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/126	Landis, J. May 3, 1978	Fourco Glass Co.	76-10-02241	Export value	Equal to those set forth on schedule attached to decision and judgment	Agreed statement of facts	of Charleston, W. Va. (Norfolk) Various copies of blueprint diagrams of a float glass company
R78/127	Landis, J. May 3, 1978	International Seaway Trading Corp. et al.	R60/12872, etc.	American selling price	As set forth in column titled "claimed value per pair" on schedule attached to decision and judgment	Agreed statement of facts	of New York Footwear

Decisions on Petitions for Rehearings Before the United States Court of Customs and Patent Appeals

APRIL 27, 1988

APPEAL 77–9.—United States *v.* Imperial Products, Inc.—CLOTH BRUSH HEADS—EXPORT VALUE—ROYALTY FEE—SUMMARY JUDGMENT. C.D. 4672 affirmed February 9, 1978 (C.A.D. 1203). Petition filed by appellant on April 3, 1978 denied.

APPEAL 77–20.—United States *v.* The De Laval Separator Company.—ON-FARM BULK MILK TANKS—REFRIGERATORS AND REFRIGERATING EQUIPMENT—AGRICULTURAL EQUIPMENT—TSUS. C.D. 4693 reversed February 16, 1978 (C.A.D. 1204). Petition filed by appellee on March 23, 1978 denied.

ERRATUM

In Customs Bulletin, Vol. 12, No. 18, dated May 3, 1978, in C.D. 4739 on page 17, the second line should read:
"appraisement purposes solely on the changes in currency parities"

Index

U.S. Customs Service

Customs Court

Reappraisement decision:
Issue:
Export value—inland freight charges—burden of proof—Certain cotton yarn of various sizes imported from Mexico was appraised on the basis of export value pursuant to sec. 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. The parties were in accord on the basis of value but disagreed as to whether or not inland freight charges were properly included as part of the dutiable value of the imported merchandise. Since the record was devoid of any evidence having probative value in support of plaintiff's position, the court held plaintiff had failed to meet its burden of proof; and accordingly, the proper values were the appraised values. C.D. 4740
Merchandise:
Cotton yarn, C.D. 4740
Rehearings, U.S. Court of Customs and Patent Appeals, denied (p. 60):
Appeals:
77–19—Cloth brush heads; export value; royalty fee; summary judgment
77–20—On-farm bulk milk tanks; refrigerators and refrigerating equipment; agricultural equipment; TSUS

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